

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 80380-3
	)	
Respondent,	)	
	)	En Banc
v.	)	
	)	
ALI ELMI,	)	
	)	
Petitioner.	)	
_____	)	Filed May 21, 2009

C. JOHNSON, J.—We are asked to determine whether under the first degree assault statute, RCW 9A.36.011, intent to inflict great bodily harm transfers to an unintended victim who is uninjured. Ali Elmi was convicted of attempted murder and four counts of first degree assault with a firearm enhancement for firing gunshots into the living room that his estranged wife, Fadumo Aden, occupied along with their three-year-old child and Aden’s three- and five-year-old siblings. No one was physically injured. The Court of Appeals affirmed Elmi’s conviction for assault against the children, finding that Elmi’s intent against Aden transferred to the children. We granted Elmi’s petition for review on the issue of transferred intent. We affirm the Court of Appeals.

## FACTUAL AND PROCEDURAL HISTORY

On May 18, 2002, Elmi telephoned his estranged wife Fadumo Aden and argued with her about renewing car tags for the car they shared. Later that evening, Aden was in the living room of her mother's house with her two siblings, ages three and five, and her and Elmi's three-year-old child. Aden heard arguing outside, so she parted the curtains to look out the living room window and saw at least two people arguing near the street. After looking out the window, she sat with the children who were watching television. Seconds later, she heard gunshots piercing the living room window.

Aden screamed and moved the children to the kitchen where she dialed 911. Aden was frantic as she talked to the operator. The operator could hear children screaming in the background and, at one point, a child's voice saying that someone was going to kill mommy. Investigating officers found four shell casings within 10 feet of the living room window, three bullet holes in the window, and bullet holes in the curtains, the television screen, and a kitchen cabinet. Several months later, police found a handgun in a car driven by a friend of Elmi. Forensic testing matched the shell casings to the handgun. Elmi was later arrested driving the same car.

The State charged Elmi with attempted murder and four counts of first degree assault with a firearm enhancement. Aden testified at trial that she could not identify the shooter. She said she told the 911 operator that Elmi fired the shots because he was the first person who came to mind when the operator asked if she knew the shooter. The children did not testify. Aden doubted the children knew what was going on and testified that they were reacting to her screams rather than the gunshots.

The trial court provided the jury with instruction 20, which addressed transferred intent:

If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took affect (sic) upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

Clerk's Papers (CP) at 181. The jury rendered a general verdict finding Elmi guilty as charged. The trial court merged one count of first degree assault with the attempted murder conviction and sentenced Elmi accordingly.

The Court of Appeals affirmed Elmi's assault convictions against the

children. *State v. Elmi*, 138 Wn. App. 306, 156 P.3d 281 (2007).<sup>1</sup> In doing so, the court applied the reasoning from *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994), to conclude, consistent with the jury instruction, that the statutory intent against Aden, i.e., the intent to inflict great bodily harm, did not have to match a specific victim and proof of Elmi's intent as to Aden satisfied the statutory intent element for the assaults against the children. The court found that even if specific intent was required to match a specific victim, the doctrine of transferred intent could be applied to transfer the intent against Aden to intent against the children. The court relied on case law from other states in rejecting Elmi's argument that the doctrine should not apply when unintended victims suffer no injury or the defendant is unaware of their presence. Finally, the court found that the State provided sufficient evidence to prove that the children were placed in apprehension of harm and that Elmi had the requisite intent for purposes of the applicable common law forms of assault. We granted review on the issue of transferred intent. *State v. Elmi*, 165 Wn.2d 1005, 180 P.3d 784 (2008).

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<sup>1</sup> For his actions against Aden, Elmi was convicted of attempted first degree murder and first degree assault. The Court of Appeals affirmed Elmi's attempted murder conviction but vacated the assault conviction as violating double jeopardy. The attempted murder conviction is not before us.

## ISSUE

Whether there is sufficient evidence of intent to support Elmi's convictions of first degree assault against the children.

## ANALYSIS

### *First Degree Assault*

Elmi requests that we reverse his convictions of first degree assault against the children on the basis that the State failed to present sufficient evidence of specific intent to assault the children. He contends that jury instructions 17 (definitions of assault) and 20 (transferred intent) erroneously relieved the State of the burden of proving every element of the crime.<sup>2</sup> In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). We draw all reasonable inferences from the evidence in favor of the State.

Assault in the first degree is defined by statute, in relevant part: "A person is

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<sup>2</sup> Elmi did not object to the transferred intent instruction at trial. However, the State does not contest this claim being raised for the first time on appeal.

guilty of assault in the first degree if he or she, *with intent to inflict great bodily harm . . . assaults another with a firearm . . .*” RCW 9A.36.011(1)(a) (emphasis added). To uphold Elmi’s first degree assault convictions, we must find that each element of the crime is satisfied—that Elmi, with (1) intent to inflict great bodily harm, (2) assaulted (3) another (4) with a firearm. As noted above, we granted review only on the question of transferred intent.

The mens rea for first degree assault is the specific intent to inflict great bodily harm. Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result. *Wilson*, 125 Wn.2d at 218. First degree assault does not, under all circumstances, require that the specific intent match a specific victim.

The term assault in RCW 9A.36.011(1)(a) constitutes an element of the crime of first degree assault. *State v. Smith*, 159 Wn.2d 778, 788, 154 P.3d 873 (2007) (finding the term assault constitutes an essential element of the crime of second degree assault). Because assault is not defined in the criminal code, courts have turned to the common law for its definition. Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt

with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.<sup>3</sup> These definitions are merely descriptive of the term assault and do not constitute additional alternative means of committing the crime of assault. *Smith*, 159 Wn.2d at 785.<sup>4</sup>

It is undisputed that Elmi fired gunshots specifically intending to inflict great

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<sup>3</sup> These definitions of assault were provided to the jury in instruction 17:

An assault is an intentional touching or striking or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP at 178. Instruction 17 mirrors *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.50 (2008).

<sup>4</sup> We reject Elmi's assertion that instruction 17 deprived him of his due process right to jury unanimity on the types of intent and assaultive harm found. Elmi argues he is entitled to jury unanimity because each common law definition of assault constitutes an alternative means of committing the crime and is so disparate as to constitute a separate offense. This argument is meritless. As noted above, this court has held that the common law definitions of the term "assault" are merely descriptive and do not create alternative means of committing the crime of assault. *Smith*, 159 Wn.2d at 785-87. Therefore, there is no due process right to jury unanimity.

bodily harm upon Aden. The question remains whether Elmi's intent against Aden transfers under RCW 9A.36.011 to meet the intent element against the children.

*Intent*

Elmi argues that proof of assault of the children required proof of specific intent to either attempt a battery against the children or to put the children in apprehension of harm. Elmi claims that contrary to actual assault, attempted battery and apprehension of harm definitions of assault require that specific intent match a specific victim. Because he was unaware of the children's presence in the house, Elmi contends that his first degree assault convictions against the children must be reversed for insufficiency of the evidence.

Elmi's assertion is only partially supported by the rule in *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994). We determined in *Wilson* that assault in the first degree requires a specific intent. This means the intent to produce a specific result is an essential element to the crime of assault, whether assault is defined under the circumstances by common law definitions of actual battery, attempted battery, or apprehension of harm. We noted, however, that assault does not, under all circumstances, require that the specific intent match a specific victim. *Wilson*, 125



Wn.2d at 218. In *Wilson*, this court reinstated the defendant's two first degree assault convictions, finding that under RCW 9A.36.011, once the specific intent to inflict great bodily harm is established, this intent may transfer to any unintended victim. After being ejected from a tavern for rowdy behavior, Wilson fired several gunshots into the tavern, missing his intended victims, Jones and Judd, but striking two unintended victims, Hurles and Hensley. Reading the various assault statutes in combination with the common law definitions of assault, we concluded that Wilson assaulted Hurles and Hensley in the first degree "when, with an intent to cause great bodily harm to Jones or Judd or both, Wilson discharged bullets from a firearm into the neck of Hurles and into the side of Hensley." *Wilson*, 125 Wn.2d at 218. We held the doctrine of transferred intent was unnecessary to convict Wilson of assaulting the unintended victims because the doctrine is generally applied only when a criminal statute matches specific intent with a specific victim. Because RCW 9A.36.011 does not require that specific intent match a specific victim, under a literal interpretation of the statute, Wilson's specific intent to inflict great bodily harm transferred to the two people who were actually physically injured. *Wilson*, 125 Wn.2d at 219. *Wilson* is distinguishable to the extent that the case involved an

actual battery (gunshot wounds) upon unintended victims, where it was simple to specify the victims. But read as a whole, *Wilson* does not limit intent to that which was aimed at a person wounded as a result of the assault. Wilson may have known others besides his intended victims were present in the tavern when he fired gunshots. Yet *Wilson* supports the general rule that under RCW 9A.36.011, specific intent need not match a specific victim.

The present case implicates the attempted battery and apprehension of harm definitions of assault. And just as in the present matter, the specific persons Wilson intended to harm were also assaulted because an *attempted* battery was perpetrated against them. The assault statute provides for the various methods of assault to be treated equally. As such, whether the unintended victim is actually battered (like in *Wilson*) or not (like in this case) is irrelevant for purposes of determining whether an assault occurred.

Indeed, RCW 9A.36.011 provides that once the mens rea is established, any unintended victim is assaulted if they fall within the terms and conditions of the statute. *Wilson*, 125 Wn.2d at 219. This conclusion is supported by the plain language of RCW 9A.36.011(1)(a): “A person is guilty of assault in the first degree

if he or she, with *intent to inflict* great bodily harm: . . . [a]ssaults *another* with a firearm . . . .” (emphasis added). In so reasoning, we hold in accord with *Wilson*, that once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim.

Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, or a car, she or he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but physically unharmed.

In this case, Elmi intended to inflict bodily injury upon Aden or to put her in apprehension of bodily harm. Elmi made that attempt when he opened gunfire into the living room that Aden and the children occupied. Also, viewing the evidence in

the light most favorable to the State, there is sufficient evidence that the children were in fact put in apprehension of harm. When Elmi fired the gunshots, the children were sitting in the living room, watching television. Bullets pierced the living room window, curtains, and television screen. At the beginning of the 911 tape, the children are screaming and crying, and, as the Court of Appeals noted, the children continue to make intermittent sounds of distress throughout the duration of the 911 call. Whether or not the children comprehended that a gun was being fired, we could infer from this evidence that the children were put in apprehension of bodily harm. This specific intent to harm Aden transferred to the children under RCW 9A.36.011. Finding the intent element is satisfied as to the children, we affirm Elmi's first degree assault convictions.

### CONCLUSION

The evidence viewed in the light most favorable to the State is sufficient to support the convictions of first degree assault against the children. As such, we find no impropriety with the jury instructions. We affirm the Court of Appeals.

AUTHOR:

Justice Charles W. Johnson

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WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

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Justice James M. Johnson

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Justice Debra L. Stephens

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Justice Tom Chambers

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